

ARTHUR W. CURLEY, BAR NO. 60902
 BERNADETTE BANTLY, BAR NO. 124659
 MEGHAN E. OLIVERI, BAR NO. 236107
 BRADLEY, CURLEY, ASIANO,
 BARRABEE & GALE, P.C.
 1100 Larkspur Landing Circle, Suite 200
 Larkspur, California 94939
 Telephone: (415) 464-8888
 Facsimile: (415) 464-8887

Attorneys for Defendant
 BHARAT RAKSHAK, DDS

UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 SAN JOSE DIVISION

TRUSTEES OF THE TRI-COUNTIES
 WELFARE TRUST FUND and
 PROFESSIONAL GROUP
 ADMINISTRATORS, INC., a corporation,

Plaintiffs,

v.

BAHRAT RAKSHAK, DDS, a
 professional dental corporation, d/b/a
 RODEO DENTAL GROUP; LYNNE
 SIMMS, D.D.S., a professional dental
 corporation, d/b/a RODEO DENTAL
 GROUP; JESSICA HUANTE,
 individually; BAHRAT RAKSHAK,
 individually; LYNNE SIMMS,
 individually; and DOES 1 through 15,
 inclusive,

Defendants.

No. C-07-06332 RMW

**DEFENDANT'S OPPOSITION TO
 MOTION TO REMAND**

Hearing Date: March 14, 2008
 Hearing Time: 9:00 a.m.
 Courtroom: Courtroom 6, 4th Floor
 Judge: Hon. Ronald M. Whyte

I. INTRODUCTION

This case was properly removed to federal court by the only served defendant, Bharat Rakshak, D.D.S. None of the other defendants, including Jessica Huante (now "Diaz"), has been properly served or appeared in this action.

Plaintiffs' First Amended Complaint ("Complaint") not only raises claims arising under federal law pursuant to the removal statute, 29 U.S.C. §1441(b), it raises federal claims for which

1 Congress has vested the federal courts with exclusive jurisdiction. These claims are governed by
 2 both the Labor Management Relations Act, 29 U.S.C. §185(a), *et. seq.* (“LMRA”) and the
 3 Employee Retirement Income Security Act, 29 U.S.C. § 1001, *et. seq.* (“ERISA”) and preempt all
 4 related state claims, including all of the causes set forth in plaintiff’s First Amended Complaint.
 5 Plaintiffs’ efforts to recharacterize these claims as “garden variety” tort claims is a sham.

6 As fully explained below, plaintiffs’ Motion to Remand is wholly frivolous. The
 7 Complaint was effectively removed and should now properly remain before this Court.

8 **II. PLAINTIFFS’ CLAIMS**

9 **A. The Parties**

10 This case involves the alleged breach of a collective bargaining agreement between a
 11 labor organization, Teamsters Local 890, and an employer, Rodeo Dental Group. A copy of the
 12 Collective Bargaining Agreement (“CBA”) is attached as Exhibit A to the Declaration of Bharat
 13 Rakshak, D.D.S., filed herewith.

14 The parties are as follows:

- 15 • Plaintiff Trustees of the Tri-Counties Welfare Trust Fund (“Trust Fund”). The Trust
 16 Fund provides health insurance benefits to employees pursuant to Article 24 of the CBA;
- 17 • Plaintiff Professional Group Administrators, Inc. (“PGA”). PGA administers the health
 18 care benefits and coordinates coverage issues with health care providers;
- 19 • Defendant Lynne Simms, D.D.S is an unserved defendant and the original owner of
 20 Rodeo Dental Group in Salinas, California;
- 21 • Defendant Bharat Rakshak, D.D.S. is a dentist who began working with Dr. Simms at
 22 Rodeo Dental Group in 2004; and
- 23 • Defendant Jessica (Huante) Diaz is a former employee of Rodeo Dental Group.

24 **B. The Complaint**

25 The Complaint confirms that the Trust Fund “provides health benefits to eligible
 26 employees” covered by the CBA between Teamsters Local 890 and Rodeo Dental Group.
 27 Complaint, ¶¶ 9-11. Paragraph 11 of the Complaint specifically quotes Article 24 of the CBA, in
 28 pertinent part:

When a seniority employee has maintained his seniority for at least one year with
 the Employer, he shall be deemed an eligible employee in any month in which
 work was performed and shall qualify for health and welfare coverage for the

1 following month.

2 A non-seniority employee or an employee who has not maintained his seniority
3 for at least one (1) year, shall be eligible upon having worked eighty (80) hours
4 for the Employer as disclosed by the payroll periods in the preceding month, and
5 eighty (80) hours in the current month. If an employee is deemed qualified on
6 either method of computation, the Employer shall pay such employee's health and
7 welfare premiums for said month and the following month.

8 Complaint, ¶11; CBA, Rakshak Decl. Exh. A, p.15, Art 24.2 & 24.3.

9 The Complaint alleges that Dr. Simms and/or Dr. Rakshak hired Ms. Diaz on or about
10 January 14, 2005, to a position within the collective bargaining unit covered by the CBA. It alleges
11 that under the terms of a separate "Letter of Understanding" between the Teamsters and Rodeo
12 Dental modifying the CBA, Ms. Diaz was required to work six months as a probationary employee
13 before she could become eligible for benefits. Complaint ¶ 15. This "Letter of Understanding"¹
14 expressly states that it is intended to "clarify and limit" the terms of the CBA.

15 The Complaint further alleges that on October 3, 2005, Ms. Diaz and her prematurely
16 delivered baby were admitted to Good Samaritan Hospital and that the baby was not discharged
17 until in or about February 2006. Complaint ¶ 19.

18 The Trust Fund retroactively denied coverage for the expensive medical treatment
19 provided to Ms. Diaz and her baby and now alleges that Rodeo Dental Group was "delinquent" in
20 making its premium payments pursuant to the terms of the CBA (Complaint ¶¶ 16-18) and that Ms.
21 Diaz was never "eligible" for benefits under the terms of the CBA (Complaint ¶25) and that Rodeo
22 Dental Group "intended to deceive" the Trust Fund into extending benefits to an ineligible
23 employee. Complaint, ¶ 25. Dr. Rakshak denies these allegations and contends that Ms. Diaz
24 was, in fact, an "eligible employee" under the CBA and that the Trust Fund improperly terminated
25 coverage in violation of the parties' agreement in order to avoid having to pay for medical services
26 provided to Ms. Diaz and her newborn child.

27 **C. Service of the Complaint**

28 It is undisputed that defendant Diaz was not personally served with the Summons and
Complaint. Rather, plaintiffs claim that service was effected by "substituted service" pursuant to

¹ The Letter of Understanding is appended to the CBA attached as Exhibit A to the Declaration of Bharat Rakshak, DDS, filed herewith.

1 CCP §415.20. Morbello Decl. ¶ 3. As discussed fully below, plaintiffs' attempt at "substituted
2 service" was defective because they mailed the Summons and Complaint to the wrong person at
3 the wrong address.

4 As evidenced from the proof of service by mail, plaintiffs mailed the Summons and
5 Complaint to:

6 Jessica **Huarte**
7 750 Colton Drive
8 Salinas, CA **93950**

9 Morbello Declaration, Exh. A (emphasis added).

10 Ms. Diaz' former name was "Huante," not "Huarte." Nor was her zip code "93950." Nor
11 did she ever receive the papers mailed to the wrong name and address.

12 In her declaration, Ms. (Huante) Diaz confirms:

13 "I live in Salinas, California, but my zip code is not 93950. It is
14 93907. I have not received any legal papers in the mail from the
15 Beeson, Taylor & Bodine law firm regarding a legal action
16 against me."

17 Diaz Decl. ¶3. In fact, there is no 93950 zip code in Salinas, which presumably explains why Ms.
18 Diaz did not receive the Summons and Complaint.

19 **III. LEGAL ARGUMENT**

20 **A. Removal Was Effective by Dr. Rakshak – 21 The Only Properly Served Defendant**

22 It is undisputed that Dr. Rakshak was served with the Summons and First Amended
23 Complaint on or about November 15, 2007. It is also undisputed that defendant Lynne Simms,
24 D.D.S. has never been served. The only dispute regarding service of process involves individual
25 defendant, Jessica (Huante) Diaz. As explained below, plaintiffs failed to properly serve Ms. Diaz
26 who is, in any event, merely a nominal defendant in this action. Therefore, Dr. Rakshak had no
27 obligation to join Ms. Diaz in the removal to federal court.

28 The requirement that all defendants join in the notice of removal has several recognized
exceptions, two of which apply in this case.

1 **1. Ms. Diaz Was Not Properly Served**

2 As plaintiffs acknowledge in their moving papers, a removing defendant has no
3 obligation to join a non-served defendant in the removal process. *Salveston v. Western States*
4 *Bankcard Assn* (9th Cir. 1984) 731 F.2d 1423,1429; *Gossmeier v. McDonald* (7th Cir. 1997) 128
5 F3d 481, 489.

6 Dr. Rakshak's counsel, Bernadette Bantly, checked with the Monterey County Superior
7 Court Clerk prior to removing this case and was informed that the only proof of service on file was
8 for Dr. Rakshak. Bantly Decl ¶ 2. In fact, although plaintiffs claim to have served Ms. Diaz on or
9 about December 4, 2007, no proof of service was filed with the state court until after the removal
10 was effectuated on December 13, 2007. See Morbello Decl. Exh. A; Bantly Decl ¶ 3 & Exh. A .
11 In any event, plaintiffs' attempts to sandbag Dr. Rakshak by waiting to file this proof of alleged
12 service must fail because the purported "substituted service" on Ms. Diaz was defective.

13 California Code of Civil Procedure sets forth a detailed multi-step process for substituted
14 service to be effective. In particular, section §415.20 requires that the Summons and Complaint be
15 mailed to the defendant at his or her "usual mailing address." Section 415.20 requires **strict**
16 **compliance**. "In order to obtain in personam jurisdiction through any form of constructive service
17 there must be strict compliance with the requisite statutory procedures." *Zirbes v. Stratton* (1986)
18 187 Cal.App. 3d 1407, 1416. See also *Corcoran v. Arouh* (1994) 24 Cal.App.4th 310 (service
19 improper because no connection between defendant and address at which substituted service was
20 allegedly made upon him).

21 Here, plaintiffs' attempt at substituted service was defective because they mailed the
22 Summons and Complaint to the wrong person at the wrong address. Most importantly, Ms. Diaz
23 never received the papers. Diaz Decl. ¶3. For all of these reasons, Ms. Diaz was not properly
24 served and, therefore, was not required to join in the removal process.

25 **2. Ms. Diaz Is a Nominal Defendant**

26 Ms. Diaz is a nominal defendant only. Otherwise, plaintiffs would have taken a default
27 judgment against her due to her failure to respond to the Complaint. For this separate and
28 additional reason, Dr. Rakshak had no obligation to join Ms. Diaz in the removal process. As the

only properly served defendant, Dr. Rakshak was entitled to remove the action entirely on his own.

B. Plaintiffs Claims Are Preempted by the LMRA

The LMRA provides federal jurisdiction over and authorizes federal courts to fashion a body of federal common law to enforce collective bargaining agreements. 29 U.S.C. 185(a); *Textile Workers v. Lincoln Mills* (1957) 353 U.S. 448, 455-456. The body of common law authorized by the LMRA **completely preempts state law** claims for alleged violation of a collective bargaining agreement. *Franchise Tax Board v. Construction Laborers Vacation Trust* (1983) 463 U.S. 1, 23.

One of the primary rationales for this complete preemption is to ensure the uniform interpretation of labor agreements. Different interpretations of contract terms by state and federal courts would "inevitably exert a disruptive influence upon both the negotiation and administration of collective bargaining agreements...[and] would tend to stimulate and prolong disputes as to [their] interpretation." *Teamsters Local 174 v. Lucas Flour Co.* (1962) 369 U.S. 95, 103-104.

The test for LMRA preemption is whether resolution of the state law claim requires the court to interpret a collective bargaining agreement. *Lingle v. Norge Div. Of Magic Chef, Inc.* (1988) 486 U.S. 399, 412. Plaintiff's artful characterization of the claims is not controlling. Rather, it is the substance of the claims that determines preemption. Thus, a plaintiff cannot escape the preemptive effect of the LMRA by recharacterizing their contract claims as "fraud" or "negligence" or other tort claims. *Young v. Anthony's Fish Grottos, Inc.* (9th Cir. 1987) 830 F.2d 993, 999.

The Supreme Court's seminal decision in *Allis-Chambers v. Lueck* (1985) 471 U.S. 202 is instructive. In *Allis-Chambers*, an employee claimed that his employer harassed him and, thereby, hindered his receipt of benefits under an employer-funded insurance policy included in the collective bargaining agreement. The employee brought a state tort claim against his employer for bad-faith handling of his insurance claim. The Supreme Court held that such claim was preempted, stating:

If the policies that animate § 301 are to be given their proper range, . . . the pre-emptive effect of § 301 must extend beyond suits alleging contract violations. These policies require that "the relationships created by [a collective-bargaining] agreement" be defined by application of "an evolving federal common law

grounded in national labor policy."

Id. At 1911, quoting *Bowen v. United State Postal Service* (1983) 459 U.S. 212, 224-25.

Following the *Allis-Chalmers* decision, the Ninth Circuit has consistently ruled that state law claims for fraud related to a collective bargaining agreement are preempted by the LMRA. See e.g., *Bale v. General Telephone Co.* (9th Cir. 1986) 795 F2d 775 (state law claims for fraudulent misrepresentation preempted).

Here, all of plaintiff's claims arise directly from the parties' collective bargaining agreement, which is repeatedly referred to throughout the First Amended Complaint. A copy of the CBA is attached as Exhibit A to the accompanying Declaration of Bharat Rakshak, D.D.S. As explained below, these claims could not conceivably be resolved without extensive interpretation of numerous provisions of the CBA relating to the following issues:

1. Eligibility

One of the primary issues in this case is whether former employee Jessica (Huante) Diaz was "eligible" for medical benefits based on her hours worked. Her eligibility can only be determined based on an interpretation of **Article 24** of the CBA entitled "Health and Welfare, Major Medical and Dental." This analysis is complicated by the subsequent "Letter of Understanding" between Rodeo Dental and Teamsters Local 890, which modified the eligibility requirements and requires additional consideration. See Rakshak Decl. Exh. A.

2. Seniority

Article 24 provides that only a "seniority employee" is eligible for benefits. Seniority is defined in **Article 14** of the Collective Bargaining Agreement. The effect of Ms. Diaz' pregnancy leave on her seniority and eligibility for benefits must also be considered by analyzing **Article 20** regarding "Leaves of Absence." See Rakshak Decl. Exh. A.

3. Premium Payments By Employer

Plaintiffs assert that they terminated coverage for nonpayment of premiums, although another explanation is that they terminated coverage to avoid having to pay for the expensive medical services incurred by their insured, Jessica (Huante) Diaz and her prematurely born child. This issue cannot be resolved without analyzing **Article 24.1** regarding premium

1 | payments and **Article 27** regarding delinquencies. See Rakshak Decl. Exh A.

2 | Thus, unlike the cases cited by plaintiffs², resolution of this action will necessarily require
3 | that the Court review and analyze numerous provisions of the CBA that are inexorably
4 | intertwined with plaintiffs' claims.

5 | **C. Plaintiffs' Claims are Also Preempted by ERISA**

6 | Except for state insurance laws, ERISA "shall supercede any and all state laws insofar as
7 | they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). This
8 | provision of ERISA was modeled after the LMRA and is likewise intended to develop a body
9 | of federal common law under ERISA designed to assure a nationally uniform administration of
10 | employee benefit plans. *Aetna Health, Inc. V. Davila* (2004) 542 U.S. 200, 208. As with the
11 | LMRA, this **complete preemption** creates federal removal jurisdiction and any state law
12 | claims covered by ERISA are recharacterized as claims arising under federal law and
13 | removable to federal court. *Metropolitan Life Ins. Co. V. Taylor* (1987) 481 U.S. 58, 66.

14 | In this case, all of plaintiffs claims are alleged by health plan trustees/administrator
15 | against a health plan fiduciary, Rodeo Dental Group, and relate directly to the management of
16 | an employee benefit plan. Section 502(a) of ERISA provides comprehensive remedies for such
17 | claims, including actions to recover benefits due and/or enforce rights under the plan. These
18 | remedies supercede plaintiffs' alleged common law state claims, including their claims for
19 | fraud, negligence and misrepresentation. 29 U.S. C. 1144(a); *Olsen v. General Dynamic Corp.*
20 | (9th Cir. 1991) 960 F.2d 1418, 1422-23.

21 | In *Olsen*, an employee brought an action against his employer for fraud relating to his
22 | employee benefit plan, claiming that the employer made misrepresentations concerning the
23 | _____

24 | _____
25 | ² No analysis of the collective bargaining agreement was required in *Operating Engineers*
26 | *Pension Trust v. Wilson* (9th Cir. 1990) 915 F.2d 535, because the fraud claim was based on
27 | conduct that allegedly induced the employee into signing an agreement and was therefore conduct
28 | extraneous to the agreement. Similarly, in *Felix v. Lucent Technologies* (10th Cir. 2004) 387 F.3d
1146, the fraud claims were based on an employer's fraudulent representations that induced
employees to retire early and, thus, were also extraneous to the agreement. In contrast, in this
case, the validity of each and every claim in plaintiffs' Complaint will require the Court to analyze
the specific terms of the CBA.

benefits. The Ninth Circuit affirmed that the fraud claim was preempted by ERISA because it "related to" an employee benefit plan. The Ninth Circuit held:

"Section 514(a) of ERISA provides that the Act 'shall supercede any and all State laws insofar as they may relate to any employee benefit plan.' Section 514(c)(1) indicates that this preemption provision extends to all state common law causes of action - provided, of course, that they relate to an employee benefit plan. As the Supreme Court has noted, this preemption clause is 'deliberately expansive, and designed to establish pension plan regulation as exclusively a federal concern.' Consistent with that purpose, 'the phrase "relate to" [is] given its broad common-sense meaning, such that a state law "relates to" a benefit plan in the normal sense of the phrase, if it has a connection with or reference to such plan...

Given the Supreme Court's directive that ERISA's preemption provision is to be construed broadly, it is difficult to see how [the employee's] fraud claim could be found not to 'relate to' an employee benefit plan."

Id. At 1420-21 (emphasis added; citations omitted).

Likewise, despite plaintiffs' artful pleading and attempts to persuade the Court otherwise, this case **relates directly to** the employee benefit plan administered by the Trust Fund and PGA. All of the key issues in this case, including seniority, eligibility, premium payments and delinquencies, if any, must be analyzed in direct reference to the specific definitions and other terms of the CBA and related plan documents. Accordingly, as in *Olsen*, it is hard to imagine how plaintiffs claims in this case could be found not to "relate to" an employee benefit plan.

Plaintiffs cite no case law that compels a different result. The only Ninth Circuit case cited by plaintiffs on this issue is *State Carpenters Pension Trust Fund v. Citibank* (9th Cir. 1997) 125 F.3d 715, which is inapposite. In that case, the pension trust fund was involved in a commercial dispute with the bank relating to the handling of pension investments. On those facts, the Ninth Circuit found no ERISA preemption and reiterated its position that:

"The key to distinguishing between what ERISA preempts and what it does not lies, we believe, in recognizing that the statute comprehensively regulates certain *relationships*: for instance, the relationship between plan and plan member, between plan and employer, between employer and employee (to the extent an employee benefit plan is involved), and between plan and trustee.

But ERISA doesn't purport to regulate those relationships where a plan operates just like any other commercial entity - for instance, the relationship between the plan and its own employees, or the plan and its insurers or creditors, or the plan and the landlords from whom it leases office space."

1 *State Carpenters Pension Trust Fund v. Citibank, supra*, 125 F.3d at 724.

2 Here, there is no commercial relationship between the parties. Rather, plaintiffs' claims
3 involve an ERISA benefit plan, an employer and an employee. Pursuant to Ninth Circuit law,
4 these claims are preempted. For this separate and independent reason, removal was Dr.
5 Rakshak was appropriate.

6
7 **D. The Related State Court Action Has No Bearing On This Removed Case**

8 Despite plaintiffs' legally unsupported, but creative attempts to argue otherwise, the
9 pendency of another related state court proceeding does not affect the removal analysis in this
10 case. Dr. Rakshak is only a nominal defendant in the related state court proceeding in Santa
11 Clara Superior Court. Moreover, removal of the related state law claim filed by Good
12 Samaritan Hospital would not have been proper because a health care provider's suit against an
13 ERISA plan for payment is generally not subject to removal. *Hermann Hosp. V. MEBA Med.*
14 *& Benefits Plan* (5th Cir. 1988) 845 F2d 1286, 1288-1289.

15 In any event, Dr. Rakshak has dutifully filed and served both a "Notice of Pendency of
16 Other Proceedings" and a "Certificate of Interested Parties" in this case pursuant to Northern
17 District Local Rule 3-13. Presumably, the parties and the Court will address the issue of
18 consolidation at or before the April 18, 2008 Case Management Conference.

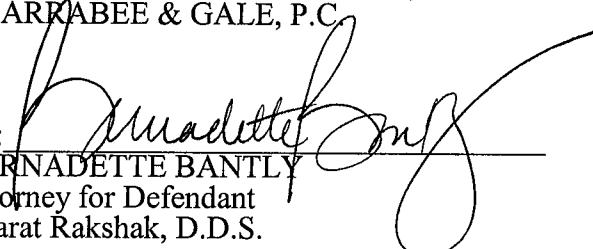
19 **IV. CONCLUSION**

20 For all of the foregoing reasons, defendant Bharat Rakshak, D.D.S. properly removed this
21 action to federal court where it should remain.

22 Dated: February 14, 2008

Respectfully submitted,

BRADLEY, CURLEY, ASIANO,
BARRABEE & GALE, P.C.

23
24
25
26 By: 
BERNADETTE BANTLY
27 Attorney for Defendant
Bharat Rakshak, D.D.S.

28 H:\Docs\TDIC\7356\POpposition to Motion to Remand.wpd

PROOF OF SERVICE

C.C.P. Section 1013a, C.C.P. Section 2015.5

Trustees of the Tri-Counties Welfare Trust Fund, et al. v. Bahrat Rakshak, DDS, et al.

Monterey County Superior Court, Case No. M 86583

United States District Court Northern District of California, Case No. C 07-06332 RMW

I, the undersigned, declare that:

I am employed in the County of Marin, State of California. I am over the age of 18 years and not a party to the within action. My business address is 1100 Larkspur Landing Circle, Suite 200, Larkspur, CA 94939.

On **February 15, 2008**, I served the attached:

DEFENDANT'S OPPOSITION TO MOTION TO REMAND

(☐) **BY FACSIMILE**: By transmitting the same from a facsimile machine (415) 464.8887 to the person(s) identified below whose facsimile transmission machine telephone number(s) listed below. The transmission was reported complete without error by a transmission report issued by the sending facsimile transmission machine.

(☒) **BY MAIL**: I placed a true copy thereof in a sealed envelope, with postage thereon fully prepaid for first-class mail, in the designated outgoing mail receptacle at Bradley, Curley, Asiano, Barrabee & Gale for collection by another employee who is responsible in the normal course of business, for depositing the stamped envelopes for mailing this same day in the United States Mail at 1100 Larkspur Landing Circle, Larkspur, California addressed to:

Attorneys for Plaintiffs
Matthew Morbello, Esq.
Teague P. Paterson, Esq.
Beeson Tayer & Bodine
1404 Franklin Street, Fifth Floor
Oakland, CA 94612
Tel: (510) 625-9700
Fax: (510) 625-8275

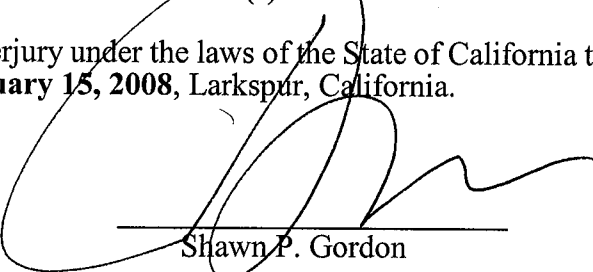
Michael A. Dubin, Esq.
Hooper, Lundy & Bookman, Inc.
575 Market Street, Suite 300
San Francisco, CA 94105

James Wold, Esq.
Wold Law Group
2455 Mission Street
San Marino, CA 91108

(☐) **BY FEDERAL EXPRESS**: I placed a true copy thereof in a sealed Federal Express overnight envelope. The overnight envelope was taken to the Federal Express drop off located at 1100 Larkspur Landing Circle, Larkspur, California, and was addressed as noted above:

(☐) **BY PERSONAL SERVICE**: I placed a true copy thereof in a sealed envelope, and caused such envelope to be delivered by hand to the addressee(s) noted above.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed **February 15, 2008**, Larkspur, California.


Shawn P. Gordon